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Investments In The Territory Of The Former German Democratic Republic

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Michael Gruson and Georg F. Thoma

Abstract

This Article intends to analyze the major issues which come up in almost every transaction involving investments in the Former GDR. Part I briefly describes the law applicable to transactions in the Former GDR. Part II outlines the legal structure of enterprises in the territory of the Former GDR, the ownership of these enterprises, and questions relating to their balance sheets. Part III addresses the important question of restitution or compensation claims which may be asserted against such enterprises or the investor. Part IV considers problems with which an investor in the Former GDR typically is confronted, mainly issues of environmental liability and the need to reduce the work force. Part V describes the protection of industrial property rights in the Former GDR.

ARTICLES

INVESTMENTS IN THE TERRITORY OF THE FORMER GERMAN DEMOCRATIC REPUBLIC

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INTRODUCTION

Much has been said and written about the difficult economic situation in the territory of the former German Democratic Republic (the "Former GDR") or "the five new states"¹—as Germans have taken to call the area of the Former GDR—and about the efforts of privatizing the nationalized industry in the Former GDR.² In brief, a governmental agency, Treuhandanstalt ("Trust Agency"), has become the owner of the approximately 8000 companies located in the Former GDR and is charged with the task of selling them as promptly as possible to German and foreign investors. This is the largest privatization and restructuring effort that has ever been undertaken. This Article will not address the political and economic questions involved in this effort but will deal with the legal issues which an investor in the territory of the Former GDR will likely have to face.

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1. The five new states are Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt, and Thüringen (referred to as "die fünf neuen Bundesländer").

2. See, e.g., *Der grosse Bluff*, MANAGER MAGAZIN NO. 12, 229 (1990); Brown & Jewell, *Treuhandanstalt: 8,000 Eastern German Companies For Sale*, 3 CAL. INT'L L. SEC. NEWSL. 1 (Winter 1990); Henning Klodt, *Government Support for Restructuring the East German Economy* (paper prepared for the conference "Economic Aspects of German Unification," American Institute for Contemporary German Studies, Washington, D.C., Nov. 13-15, 1990) (copy on file at the Fordham International Law Journal office); Rahmann, *Investing in Eastern Germany*, INT'L BUS. LAW. 507 (Dec. 1990).

This Article intends to analyze the major issues which come up in almost every transaction involving investments in the Former GDR. Part I briefly describes the law applicable to transactions in the Former GDR. Part II outlines the legal structure of enterprises in the territory of the Former GDR, the ownership of these enterprises, and questions relating to their balance sheets. Part III addresses the important question of restitution or compensation claims which may be asserted against such enterprises or the investor. Part IV considers problems with which an investor in the Former GDR typically is confronted, mainly issues of environmental liability and the need to reduce the work force. Part V describes the protection of industrial property rights in the Former GDR. This Article concludes that a potential investor must be aware that although the Former GDR is now a part of the Federal Republic of Germany, he will be faced with novel and difficult legal issues. Only a thorough understanding of these issues will prevent costly mistakes and disappointments.

I. THE APPLICABLE LAW

As a general principle, the Unification Treaty of August 31, 1990 ("Einigungsvertrag")³ stipulates that as of October 3,

3. Treaty Between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity, BGBl. II at 889 (dated Aug. 31, 1990) ("Unification Treaty") and Agreement between the Federal Republic of Germany and the German Democratic Republic on the Implementation and Interpretation of the Unification Treaty, BGBl. II at 1239 (dated Sept. 18, 1990), both ratified through the Act of September 23, 1990, BGBl. II at 885 ("Unification Treaty Act").

Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands—Einigungsvertrag [hereinafter Unification Treaty]—*ratifiziert* in der Bundesrepublik Deutschland durch Gesetz vom 23. September 1990 zu dem Vertrag vom 31. August 1990 zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands—Einigungsvertragsgesetz—und der Vereinbarung vom 18. September 1990 (BGBl. II at 885) [hereinafter Unification Treaty Act].

An official comment to the Unification Treaty is contained in the "Erläuterungen zu den Anlagen zum Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands vom 31. August 1990" [hereinafter Official Comment]. The Official Comment has been published by Nomos Verlagsgesellschaft, Baden-Baden (1990) under the title *Erläuterungen zum Einigungsvertrag*, and the citations in this Article are to this publication.

1990, the date of the entry of the five new states into the Federal Republic of Germany ("Federal Republic"), the federal law of the Federal Republic (the "West German law" or "West German statutes") takes effect in its entirety in these states, unless otherwise provided in the Unification Treaty.⁴ The exceptions provided for in the Unification Treaty are significant. Annex I to the Unification Treaty enumerates those West German statutes which do not apply to the territory of the Former GDR⁵ or apply only in a modified form or subject to certain conditions.⁶ Annex I affects several hundred West German statutes. The Unification Treaty further provides that in certain subject areas the law of the Former GDR remains in force.⁷ Laws relating to areas which under the Constitution, the Basic Law, of the Federal Republic ("Grundgesetz") are reserved to the legislative jurisdiction of the German states, survive as state law of the five new states.⁸ These laws, however, survive only to the extent that they are consistent with the German Constitution and all other West German law applicable in the territory of the Former GDR and with the directly

4. Unification Treaty, *supra* note 3, art. 8.

5. *Id.* annex I. The Unification Treaty has three annexes. Each annex ("Anlage") to the Unification Treaty is divided into chapters ("Kapitel"), divisions ("Sachgebiet"), and subdivisions ("Abschnitt").

6. One major modification relates to a possible division of the ownership of land and the ownership of buildings and other fixtures located on such land. *Id.* annex I, ch. III, div. B, subdiv. II, art. 231, § 5. The law of the Former GDR in the past distinguished between ownership in the land, often held by the government, and so-called utilization rights, granted by the government to private persons or legal entities. These utilization rights were frequently not registered with the land registry. This division is not possible under West German law pursuant to which the title to a building generally runs with the land. BÜRGERLICHES GESETZBUCH [BGB], § 94 (Civil Code). Section 5 of article 231 provides that separate ownership on buildings and fixtures based on such utilization rights remains valid. *See* Official Comment, *supra* note 3, at 69. The provisions of section 5 apply to buildings which were subject to separate ownership at the time of unification or which were erected subsequently on the basis of utilization rights existing at the time of unification. The Unification Treaty provides that even unregistered utilization rights remain valid *vis-à-vis* a bona fide purchaser of land if a building had been erected on such land on the basis of such utilization rights. Unification Treaty, *supra* note 3, annex I, ch. III, div. B, subdiv. II, art. 233, § 4. The provisions of section 4 of article 233 provide that if no building has been erected, the unregistered utilization right does not prevail against a bona fide purchaser of the land. *Id.* Thus, a purchaser of land can avoid the acquisition of real estate burdened with an unregistered utilization right by inspecting the land. *See* Official Comment, *supra* note 3, at 74-75.

7. Unification Treaty, *supra* note 3, art. 9.

8. *Id.* art. 9(1)

applicable laws of the European Communities.⁹ Furthermore, Annex II to the Unification Treaty enumerates certain Former GDR statutes which—although not in the exclusive legislative jurisdiction of the States—remain in force, with or without modifications;¹⁰ again, only to the extent that they are consistent with the German Constitutional Law and the directly applicable laws of the European Communities.¹¹ It is interesting to note that Annex II is much shorter than Annex I.¹² In addition, statutes adopted by the Former GDR after the signing of the Unification Treaty on August 31, 1990 survive to the extent that such statutes have been agreed upon by the Federal Republic and the Former GDR.¹³ The statutes adopted after August 31, 1990 and the statutes enumerated in Annex II survive as federal law if they deal with matters which the German Constitutional Law delegates exclusively to the federal government or makes subject to preemption by federal statutes and if federal statutes have already preempted the matter.¹⁴ Otherwise they survive as state law of the five new states. The treaties of the European Communities and their implementations and the international treaties of the Federal Republic apply to the territory of the Former GDR.¹⁵ Finally, the Unification

9. *Id.*

10. *Id.* annex II. Annex II modifies some of the surviving statutes.

11. *Id.* art. 9(2)

12. Additional statutes of the Former GDR that survive as law of the Federal Republic, subject to article 9(4) of the Unification Treaty, are enumerated in article 3 of the Agreement between the Federal Republic of Germany and the German Democratic Republic on the Implementation and Interpretation of the Unification Treaty (VEREINBARUNG ZWISCHEN DER BUNDESREPUBLIK DEUTSCHLAND UND DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK ZUR DURCHFÜHRUNG UND AUSLEGUNG DES AM 31. AUGUST 1990 IN BERLIN UNTERZEICHNETEN VERTRAGES ZWISCHEN DER BUNDESREPUBLIK DEUTSCHLAND UND DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK ÜBER DIE HERSTELLUNG DER EINHEIT DEUTSCHLANDS—EINIGUNGSVERTRAG) [hereinafter Agreement of September 18, 1991]. This Agreement was signed on September 18, 1990 and ratified by the Federal Republic together with the Unification Treaty. See *supra* note 3 (stating various documents to unification process).

13. Unification Treaty, *supra* note 3, art. 9(3). These statutes must be consistent with the German Constitution and with directly applicable laws of the European Communities. *Id.* art. 9(4).

The agreement between the Federal Republic and the Former GDR on the survival of statutes adopted after August 31, 1990 is reflected in the Agreement of September 18, 1990, *supra* note 12, art. 3.

14. Unification Treaty, *supra* note 3, art. 9(4).

15. *Id.* arts. 10 & 11. Article 12 provides essentially for a renegotiation of international treaties of the Former GDR.

Treaty itself contains rules of law.

One of the most important examples of a surviving law is the Bankruptcy Code of the Former GDR ("Gesamtvollstreckungsordnung") which remains in effect for the Former GDR.¹⁶ This Bankruptcy Code is more flexible¹⁷ than the West German bankruptcy law ("Konkursordnung" and "Vergleichsordnung").¹⁸ The present West German bankruptcy law is rather antiquated and is currently in the process of being revised. The revised bankruptcy law will apply to the whole of Germany.¹⁹ On the other hand, the Bankruptcy Code is quite vague and has not been tested. Another important surviving statute is the Law Concerning Regulation of Unresolved Property Issues ("Gesetz zur Regelung offener Vermögensfragen," hereinafter "Property Law"), and the Law Relating to Special Investments in the GDR ("Gesetz über besondere Investitionen in der Deutschen Demokratischen Republik," hereinafter "Special Investments Law"), both of which will be discussed below.²⁰

This already somewhat simplified description of the law applicable in the territory of the Former GDR shows that in a particular case it may be quite difficult to ascertain the appropriate rule of law. Legal issues may require the consideration of four different sources of law: (i) West German law, (ii) modified West German law, (iii) certain statutes of the Former GDR which may have been modified by the Unification Treaty and which are at any rate subject to the provisions of the German Constitution and the law of the European Communities, and (iv) the explicit provisions contained in the Unification Treaty. In addition, the five new states have their own body of state law which—unless modified since October, 1990—is

16. *Id.* annex II, ch. III, div. A, subdiv. II, no. 1. The Bankruptcy Law of the Former GDR (GESAMTVOLLSTRECKUNGSVERORDNUNG vom 6. Juni 1990, GBL. I No. 32 at 285, modified by Second Regulation Concerning Bankruptcy—Suspension of Proceeding (ZWEITE VERORDNUNG ÜBER DIE GESAMTVOLLSTRECKUNG—UNTERBRECHUNG DES VERFAHRENS vom 25. Juli 1990), GBL. I No. 45 at 782) survives with certain modifications as federal law for the territory of the Former GDR under the name "Gesamtvollstreckungsordnung." *Id.* annex II, ch. III, div. A, subdiv. II, no. 1.

17. Official Comment, *supra* note 3, at 22.

18. KONKURSORDNUNG (Bankruptcy Law), BGBL. III 311-4, as amended; VERGLEICHSORDNUNG (Reorganisation Law), BGBL. III 311-1, as amended.

19. Official Comment, *supra* note 3, at 22.

20. See *infra* notes 60-62, 65-85 & 91-105 and accompanying text (discussing Property Law and Special Investments Law).

identical with surviving portions of the law of the Former GDR. In each case it will be difficult to know which laws of the Former GDR survive as state laws and to what extent they survive. Compounding this problem is the fact that the statutes of the Former GDR are not always readily accessible.

II. THE LEGAL STRUCTURE OF THE ENTERPRISES IN THE TERRITORY OF THE FORMER GDR

A. *Introduction of a Market Economy*

In the socialist system of the Former GDR, the vast majority of economic entities were government-owned enterprises. As such, they were not separately incorporated but were more or less subordinated parts of the public administration. Their activities were directed by government plans rather than by independent economic considerations and decisions.

After the political events of November 1989, it soon became clear that only the establishment of a market economy with supply and demand being determinative factors for independent economic activities could overcome the economic gap between the Former GDR and the Federal Republic. It also became clear that the first step to such a fundamental change of the economic system of the Former GDR would have to be a restructuring and privatization of the government-owned enterprises.

In view of these necessities, the Former GDR enacted the Trusteeship Law of June 17, 1990 ("Treuhandgesetz"),²¹ which provided for a transformation of the government-owned enterprises into corporations in order to make them more competitive and to prepare them for sale to private investors.²²

B. *Transformation of Enterprises*

Pursuant to the Trusteeship Law, all government-owned enterprises that had not already been transformed under a transformation regulation enacted earlier in 1990 under the

21. Act on Privatization And Reorganization of State-Owned Property (GESETZ ZUR PRIVATISIERUNG UND REORGANISATION DES VOLKSEIGENEN VERMÖGENS (TREUHANDGESETZ) vom 17. Juni 1990), GBL. I No. 33 at 300 [hereinafter Trusteeship Law]. The Trusteeship Law remains in effect with certain modifications pursuant to article 25 of the Unification Treaty, *supra* note 3.

22. Trusteeship Law, *supra* note 21, §§ 1(1) & 2(6).

Modrow Administration²³ were transformed into corporations by operation of law as of July 1, 1990.²⁴ Conforming to the distinction of West German corporation law, these enterprises were to be organized either as stock corporations ("Aktiengesellschaften," commonly referred to as "AGs"), or as limited liability companies ("Gesellschaften mit beschränkter Haftung," commonly referred to as "GmbHs").²⁵ The old "Kombinate" consisting of conglomerations of several businesses became stock corporations, whereas the single businesses within the Kombinate, as well as all other economic entities, in most cases became GmbHs.²⁶

Since the transformation was effectuated by operation of law without any incorporation documents being filed in advance, the new entities had to be registered as corporations "in formation" ("im Aufbau") until all prerequisites for the organization and incorporation of an AG or a GmbH had been fulfilled.²⁷ Promptly after registration of the AG or GmbH with the commercial registry as a company "im Aufbau," the management had to take all necessary legal steps to establish and organize the AG or GmbH, including the filing of certain documents with the commercial registry.²⁸ In addition, these companies had to submit to Treuhandanstalt by October 31, 1990 a number of documents, including proposed articles of association, the audited closing balance sheet and the DM opening balance sheet as of the date of conversion to an AG or GmbH,

23. Regulation Concerning the Transformation of State-Owned Enterprises into Corporations (VERORDNUNG ZUR UMWANDLUNG VON VOLKSEIGENEN KOMBINATEN, BETRIEBEN UND EINRICHTUNGEN IN KAPITALGESELLSCHAFTEN vom 1. März 1990), GBL. I No. 14 at 107.

24. Trusteeship Law, *supra* note 21, § 11.

25. *Id.* § 11(1).

26. *Id.* The Trusteeship Law, section 1(4) refers to the following types of state-owned ("volkseigene") business entities of the Former GDR: Kombinat, Betrieb, Einrichtung and other legal units and calls these entities collectively "Wirtschaftseinheiten."

27. *Id.* §§ 14 & 21(3). Aktiengesellschaft im Aufbau or Gesellschaft mit beschränkter Haftung im Aufbau. These companies have to be registered with the commercial registry. *Id.* § 15(1).

28. *Id.* §§ 19 & 21. Companies that have not taken the steps legally required for the establishment and organization by June 30, 1991, will be dissolved. *Id.* § 22; *see* Law on the Opening Balance Sheet in Deutsche Marks and the New Determination of Capital (GESETZ ÜBER DIE ERÖFFNUNGSBILANZ IN DEUTSCHER MARK UND DIE KAPITALNEUFESTSETZUNG (D-MARKBILANZGESETZ - DMBILG)), § 57 (referring to dissolutions) [hereinafter DM Opening Balance Sheet Law].

certain financial schedules, and certain reports.²⁹ The date of conversion is in the case of all entities converted by virtue of the Trusteeship Law, July 1, 1990.³⁰ However, only very few AGs and GmbHs have been able to complete their DM opening balance sheets by October 31, 1990, and many AGs and GmbHs have not presented their DM opening balance sheet at the day of this publication. Specifically, unexpected difficulties arose with respect to valuation of assets.

Apart from the legal reorganization just mentioned, an attempt was made to reorganize the industry along activity classifications. For instance, a porcelain manufacturer with a tool making division would separately incorporate the tool making division as a subsidiary. This process, however, has not been completed. Thus, an investor must expect that a target company still includes activities in which he is not interested and which still must be spun off. Negotiations with Treuhandanstalt must include plans for such necessary spin-offs and reorganizations.

C. Ownership of the New Corporations

Treuhandanstalt, a statutory body³¹ established in connection with the first transformation ordinance of March 1990,³² is charged with the task of reorganization and privatization of the government-owned enterprises.³³ The Trusteeship Law pro-

29. Trusteeship Law, *supra* note 21, § 20; see *infra* notes 51-54 and accompanying text (discussing DM opening balance sheet).

30. Trusteeship Law, *supra* note 21, § 11. Some entities were converted prior to that date. See *supra* note 23 (referring to statutory basis for such prior conversion).

31. Bundesunmittelbare Anstalt des öffentlichen Rechts. Unification Treaty, *supra* note 3, art. 25(1). Treuhandanstalt has legal personality. *Id.*; Trusteeship Law, *supra* note 21, § 2. The Trusteeship Law provides for the formation of subsidiaries of Treuhandanstalt (Treuhand-Aktiengesellschaften), which would carry out the functions of Treuhandanstalt and hold the shares of the converted former government-owned companies. *Id.* §§ 7-10, 12. The Treuhand-AGs were never formed.

32. See *supra* note 23. Treuhandanstalt was originally established by Decree Regarding the Establishment of the Anstalt for the Trust Administration of State-Owned Property (BESCHLUSS ZUR GRÜNDUNG DER ANSTALT ZUR TREUHÄNDISCHEN VERWALTUNG DES VOLKSEIGENTUMS (TREUHANDANSTALT) VOM 1. MÄRZ 1990), GBL. I No. 14 at 107. Treuhandanstalt was reorganized by the Trusteeship Law, *supra* note 21. See Unification Treaty, *supra* note 3, art. 25 & annex II, ch. IV, subdiv. I, nos. 6 to 9; Agreement of September 18, 1990, *supra* note 12, art. 3, nos. 10-11. See generally Pickelmann & Weinhardt, *Die Umwandlung volkseigener Betriebe und Kombinate in Kapitalgesellschaften*, EUROPÄISCHES WIRTSCHAFTS & STEUERRECHT 30 (1990).

33. Trusteeship Law, *supra* note 21, §§ 1(3) & 2(6).

vides that the shares of the new corporations are directly or indirectly owned by Treuhandanstalt.³⁴

Treuhandanstalt directly holds all shares of the AGs originating from the old Kombinate. The AGs in turn own the shares of the GmbHs that used to be part of such a Kombinat prior to the transformation.³⁵ However, the management of a GmbH may request to become "independent" and to be directly owned by Treuhandanstalt.³⁶

Treuhandanstalt as the legal owner of the new corporations has the duty to make these corporations more efficient and competitive and to either privatize them by selling their shares to investors or liquidate them, if a buyer cannot be found.³⁷

D. Assets of the New Corporations

The Trusteeship Law provides that the title to the assets, including real property, that had been used before the transformation to a corporation by a government-owned enterprise for its commercial activities passed by act of law to the corporation into which such enterprise was transformed pursuant to the Trusteeship Law.³⁸ However, this transfer of title does not prejudice restitution or compensation claims arising from illegal condemnations or confiscations in the past.³⁹

E. Liabilities of the New Corporations

According to the DM Opening Balance Sheet Law ("D-Mark Bilanzgesetz"), the new companies have to show the liabilities of the government-owned enterprise from which they originated in their new DM opening balance sheet.⁴⁰ Most lia-

34. *Id.* § 1(4). Shares owned by Treuhandanstalt are indirectly owned by the Federal Republic of Germany. Unification Treaty, *supra* note 3, art. 25(1); Trusteeship Law, *supra* note 21, § 12(1).

35. Trusteeship Law, *supra* note 21, § 12(2).

36. *See id.* § 12(3). Treuhandanstalt also directly owns shares of the limited liability companies (GmbHs) which originate from economic units that were never part of a Kombinat, and the shares of GmbHs that have declared their independence from a Kombinat prior to the effectiveness of the Trusteeship Law. *Id.* § 12(1).

37. *Id.* § 8.

38. *Id.* § 11(2).

39. *Id.* § 24(1).

40. DM Opening Balance Sheet Law, *supra* note 28, § 16. The text of the DM Opening Balance Sheet Law is part of the Unification Treaty. Unification Treaty,

bilities in Ost Marks (the currency of the Former GDR) were converted into DM on the basis of two Ost Marks for one DM.⁴¹

The Trusteeship Law is silent on the question whether a corporation must assume the old debts of its predecessor entity. However, in September 1990, the Former GDR promulgated a regulation which deals with loans that are shown in the Ost Mark closing balance sheet as of June 30, 1990 of a company and have been entered into the Deutsche Mark opening balance sheet at a ratio of 2:1 according to the DM Opening Balance Sheet Law.⁴² Pursuant to this regulation, Treuhandanstalt or, if the debtor company is a subsidiary of another company, the parent company, can assume all or part of the obligation of the debtor company to repay principal and interest and thereby discharge the debtor company.⁴³ Such assumption is only permitted if the debtor company is directly or indirectly owned by Treuhandanstalt and if the discharge furthers the rehabilitation or the restructuring and the competitiveness of the debtor company.⁴⁴ An application for discharge must be filed by the debtor company, if it is a subsidiary of another company, with the parent company or, if it is directly owned by Treuhandanstalt, with Treuhandanstalt.⁴⁵ Treuhandanstalt or the parent company determine in their discretion whether and to what extent they wish to assume the

supra note 3, annex II, ch. III, div. D, subdiv. I, no. 1. The DM Opening Balance Sheet Law is effective as of July 1, 1990. DM Opening Balance Sheet Law, *supra* note 28, § 60.

41. DM Opening Balance Sheet Law, *supra* note 28, § 16(1). Note that the currency union between the Federal Republic and the Former GDR was created as of July 1, 1990 and as of that date the DM was legal tender in the Former GDR. Treaty Regarding the Creation of A Currency, Economic and Social Union Between the Federal Republic of Germany and the German Democratic Republic (May 18, 1990) (VERTRAG ÜBER DIE SCHAFFUNG EINER WÄHRUNGS-, WIRTSCHAFTS- UND SOZIALUNION ZWISCHEN DER BUNDESREPUBLIK DEUTSCHLAND UND DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK vom 18. Mai 1990), arts. 1(2), 10(5), BGBL. II at 537.

42. Regulation Concerning Discharge of Old Indebtedness of Previously State-Owned Enterprises (VERORDNUNG DES MINISTERRATS VOM 5. SEPTEMBER 1990 ÜBER MAßNAHMEN ZUR ENTSCULDUNG BISHER VOLKSEIGENER UNTERNEHMEN VON ALTKREDITEN (ENTSCULDUNGSVERORDNUNG)) § 2(1), GBL. I No. 59 at 1435 [hereinafter Discharge Regulation]; see DM Opening Balance Sheet Law, *supra* note 28, § 16.

43. Discharge Regulation, *supra* note 42, §§ 2(4) & 4(1); see DM Opening Balance Sheet Law, *supra* note 28, § 4(3).

44. Discharge Regulation, *supra* note 42, §§ 1(1) & 2(2).

45. *Id.* § 3(1).

debt and thereby discharge the debtor company.⁴⁶ The regulation remains in force until June 30, 1991.⁴⁷ This regulation is not applicable to a corporation in liquidation or bankruptcy or if the buyer of a corporation or Treuhandanstalt has assumed the loans.⁴⁸

In most negotiations with Treuhandanstalt regarding the purchase of a company located in the territory of the Former GDR, an important issue for investors will be whether Treuhandanstalt will assume obligations of the company for loans incurred prior to June 30, 1990.

F. Capitalization of the New Corporations

Many newly incorporated companies in the Former GDR are facing the problem that in the DM opening balance sheet their liabilities will exceed assets and that the deficiency shown on the DM opening balance sheet cannot be met by their own equity capital. Thus, the management of such companies would be legally obliged to file a bankruptcy petition.⁴⁹

This problem mainly results from the fact that the method applied in the Former GDR for evaluating the assets and liabilities of an enterprise was far different from the evaluation method used in countries with a free market system, and in particular, from the accounting principles the companies located in the Former GDR have to use pursuant to the DM Opening Balance Sheet Law. Under the law of the Former GDR, assets were often overvalued whereas liabilities were undervalued. Fixed assets, for example, were revalued upwards several times while their depreciation was often very slow. Capitalization and profitability of an enterprise were not relevant considerations in the socialist system of the Former GDR.⁵⁰

In order to avoid immediate liquidation of a large number

46. *Id.* § 2(3).

47. Agreement of September 18, 1990, *supra* note 12, art. 3, no. 18.

48. Discharge Regulation, *supra* note 42, § 1(2).

49. Stock Corporation Law (AKTIENGESETZ [AKTG]), BGBL. III 4121-1, as amended, § 92; Law Concerning Limited Liability Companies (GESETZ BETREFFEND DIE GESELLSCHAFTEN MIT BESCHRÄNKTER HAFTUNG [GMBHG]), BGBL. III 4123-1, as amended, § 64. See generally Meyer-Landrut, *Überschuldung als Konkursgrund*, in Festschrift für Karlheinz Quack 335 (1991).

50. See E. Scheffler & G. Heymann, DM-Eröffnungsbilanz 62-63 (1990).

of companies, the DM Opening Balance Sheet Law provides that a company may adjust its DM opening balance sheet with an interest bearing adjustment claim against the owner of the company, which in most cases will be Treuhandanstalt.⁵¹ This adjustment claim is in an amount equal to the otherwise existing deficit in the DM opening balance sheet; *i.e.*, the excess of liabilities over assets that is not covered by equity.⁵² The adjustment claim covers the otherwise existing equity deficiency but it does not create equity. However, the right to obtain an adjustment claim is not unconditional: Treuhandanstalt (or respectively any other owner) must reject the claim of a company if it believes that the company does not offer reasonable prospects for a successful rehabilitation.⁵³ The owner of a company is not obligated to undertake comprehensive fact finding as to the chances of rehabilitation and, therefore, in order to avoid an unjustified refusal, it is advisable for a company (or any investor) to present to Treuhandanstalt or any other owner facts and plans indicating that the company shows reasonable prospects of rehabilitation. Most important for the decision of Treuhandanstalt or any other owner as to whether a rehabilitation might be possible is the outlook regarding a constant earning capacity of the company in the future.

In the case of companies that are subsidiaries of an AG, which in turn is owned by Treuhandanstalt, the adjustment claim is directed against the parent company AG, and this AG has an adjustment claim against Treuhandanstalt if on a consolidated basis it shows a deficit on its DM opening balance sheet.⁵⁴

51. DM Opening Balance Sheet Law, *supra* note 28, § 24(1). This section does not apply to credit institutions, foreign trade companies and insurance companies.

52. See Commercial Code (HANDELSGESETZBUCH [HGB]), BGBL. III 4100-1, as amended, § 268(3).

53. DM Opening Balance Sheet Law, *supra* note 28, § 24(1) (referring to possibility of rehabilitation, "Sanierungsfähigkeit").

54. For a discussion of the adjustment claim against Treuhandanstalt, see E. SCHEFFLER & G. HEYMANN, *supra* note 50, at 62-69.

For the rare case of an overcapitalized company, the DM Opening Balance Sheet Law provides that Treuhandanstalt obtains claims against such company in order to absorb the overcapitalization and enable Treuhandanstalt to use this capital for the rehabilitation of other companies. DM Opening Balance Sheet Law, *supra* note 28, § 25. The claim is in the amount by which equity exceeds fixed assets (other than real estate). *Id.*; see E. SCHEFFLER & G. HEYMANN, *supra* note 50, at 70-71.

G. Change of Legal Form

The newly created AGs are governed by the West German Stock Corporation Law ("Aktiengesetz") and the new GmbHs are governed by the West German Law Concerning Limited Liability Companies ("GmbH-Gesetz"),⁵⁵ which have been made applicable by the Unification Treaty to the territory of the Former GDR without significant changes.⁵⁶

It should be noted that an investor is not bound by the legal form of the acquired business entity. Under West German law, an investor is free to choose the appropriate corporate structure for his investment, considering relevant tax, marketing, and other aspects.⁵⁷ An investor is also free to choose the legal form of a partnership.⁵⁸

It must be taken into account that the process of changing a legal structure of a business entity, which includes the notarization of legal documents and the registration with the commercial registry, will require patience because of lack of experience of the notaries and commercial registry officials of the Former GDR.

III. CLAIMS BY FORMER OWNERS OF EXPROPRIATED PROPERTY

A. Recognition of Private Ownership

The starting point of the following considerations is that, as a general principle, private ownership of all types of property, including real property, is now recognized in the Former GDR because of the introduction of the West German law. One of the most vexing aspects in connection with the acquisition of Former GDR enterprises or other forms of investment in the territory of the Former GDR is the possibility that former owners that have been illegally deprived of their property under the Former GDR government or even during the preceding period of the Third Reich may try to recover their property or at least obtain compensation. Although this Article

55. See *supra* note 49 (citing Stock Corporation Law and Law Concerning Limited Liability Companies).

56. Unification Treaty, *supra* note 3, annex I, ch. III, div. D, subdiv. III, nos. 6 & 7.

57. See AktG, *supra* note 49, §§ 362-93.

58. See HGB, *supra* note 52, §§ 105-237.

deals with the acquisition of firms in the five new states, and not with property claims by former owners of real estate and businesses, a discussion of the rights of such former owners is necessary, because these rights will be a major issue in connection with most acquisitions.

The basis of the statutory regulations regarding restitution and compensation claims is a joint declaration of the governments of the Former GDR and the Federal Republic of June 15, 1990 (the "Joint Declaration"), which has been incorporated into the Unification Treaty.⁵⁹ The Joint Declaration outlines the basic principles for a settlement of such claims.

On the basis of the Joint Declaration, the Unification Treaty provided that the Property Law⁶⁰ and the Special Investments Law⁶¹ became applicable law.⁶² At the outset, it should be pointed out that the Joint Declaration states that confiscations that were executed on the basis of occupation law between 1945 and 1949 are no longer reversible.⁶³ The Joint

59. Unification Treaty, *supra* note 3, art. 41(1), annex III. Joint Declaration of the Governments of the Federal Republic of Germany and the German Democratic Republic Concerning Regulation of Unresolved Property Issues (GEMEINSAME ERKLÄRUNG DER REGIERUNG DER BUNDESREPUBLIK DEUTSCHLAND UND DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK ZUR REGELUNG OFFENER VERMÖGENSFRAGEN VOM 15. JUNI 1990) [hereinafter Joint Declaration].

60. Law Concerning Regulation of Unresolved Property Issues (GESETZ ZUR REGELUNG OFFENER VERMÖGENSFRAGEN) [hereinafter Property Law]. Unification Treaty, *supra* note 3, annex II, ch. III, div. B, subdiv. I, no. 5. The federal government of the Federal Republic has proposed amendments to the Property Law that are contained in the proposed Law Concerning the Removal of Impediments to the Privatisation of Enterprises, Real Property and Buildings (GESETZ ZUR BESEITIGUNG VON HEMMNISSEN BEI DER PRIVATISIERUNG VON UNTERNEHMEN, GRUNDSTÜCKEN UND GEBÄUDEN), *reprinted in* Frankfurter Allgemeine Zeitung, at 8-9 (Feb. 7, 1991) [hereinafter Property Law Amendments].

61. Law Relating to Special Investments in the German Democratic Republic (GESETZ ÜBER BESONDERE INVESTITIONEN IN DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK) [hereinafter Special Investments Law]. Unification Treaty, *supra* note 3, annex II, ch. III, div. B, subdiv. I, no. 4. The Federal Republic has proposed amendments to the Special Investments Law that are contained in the proposed Law Concerning the Removal of Impediments to the Privatisation of Enterprises, Real Property and Buildings (GESETZ ZUR BESEITIGUNG VON HEMMNISSEN BEI DER PRIVATISIERUNG VON UNTERNEHMEN, GRUNDSTÜCKEN UND GEBÄUDEN), *supra* note 60 [hereinafter Special Investments Law Amendments]. These Amendments are designed to simplify the procedure and to give the present owner options to utilize the real property other than through a sale of the real property.

62. Unification Treaty, *supra* note 3, annex II, ch. III, div. B, subdiv. I.

63. Joint Declaration, *supra* note 59, art. 1. These measures principally relate to the land reform (Bodenreform) which took place between 1945 and 1949. Posses-

Declaration provides that a final decision regarding possible governmental compensation payments for such confiscations shall be reserved to the parliament of the unified Germany.⁶⁴ However, this provision has been challenged in a suit which is pending before the German Constitutional Court ("Bundesverfassungsgericht").

B. Basic Principle of Reconveyance

According to the Property Law, any property of which a former owner has been deprived of by state acts transferring the property to state ownership ("Volkseigentum") or to the ownership of a third party is to be reconveyed to the former owner or its successor.⁶⁵ The following classes of property are covered by the Property Law:

- (i) property expropriated without or for insufficient compensation and transferred to state ownership;
- (ii) property transferred to a third person by a public administrator of the property or by the government after transfer of such property to state ownership;
- (iii) property transferred to state ownership based on the resolution of the Council of Ministers of February 9, 1972;⁶⁶

sion (but not ownership) of land expropriated in the land reform could be transferred to members of LPGs, *see infra* note 67, but could also be taken away if the transferee did not make proper use of the property. First Regulation Concerning the Implementation of the Transfer of Possession of Land Reform Properties (ERSTE VERORDNUNG ÜBER DIE DURCHFÜHRUNG DES BESITZWECHSELS BEI BODENREFORMGRUNDSTÜCKEN vom 07. Aug. 1975), GBL. I No. 35 at 629, in the version of the Second Regulation (ZWEITE VERORDNUNG vom 07. Januar 1988), GBL. I No. 3 at 25, §§ 1, 9. A person to whom such land was transferred presumably did not become legal owner and, if the land was later taken away, has no claim for reconveyance under the Property Law, *supra* note 60. The regulation was abrogated by Law Concerning Ownership Rights in Land Reform Properties (GESETZ ÜBER RECHTE DER EIGENTÜMER VON GRUNDSTÜCKEN AUS DER BODENREFORM vom 06. März 1990), GBL. I No. 17 at 134.

64. Joint Declaration, *supra* note 59, art. 1; *see* Papier, *Verfassungsrechtliche Probleme der Eigentumsregelung im Einigungsvertrag*, 44 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 193 (1991).

65. Property Law, *supra* note 60, §§ 1 & 3.

66. Beginning in 1956 many companies were forced to change their legal form to partnerships and to accept the government as limited partner, the former owner becoming general partner. In 1972, the remaining rights of the general partners were taken and transferred to the government. *See* Rahmann, *supra* note 2.

- (iv) buildings on real property transferred to state ownership due to over-indebtedness as a result of the low level of rents; and
- (v) property taken by the government or a third party by means of an abuse of power, corruption, duress or deception.⁶⁷

The Property Law applies to, among other things, real estate (with or without buildings), chattels, claims for payment of money, equity interests in companies, and ownership in branches of companies having their domicile outside the For-

67. Property Law, *supra* note 60, § 1. The Property Law also applies to illegal takings that occurred during the Third Reich. *Id.* § 1(6).

It is important to note, that the Property Law does not cover real property which was "contributed" by farmers to farm cooperatives (landwirtschaftliche Produktionsgenossenschaften, hereinafter LPG). The farmer remained legal owner of the contributed land; however, only the LPG had the use of the land (subject to limited exceptions). Law Concerning Farm Cooperatives (GESETZ ÜBER DIE LANDWIRTSCHAFTLICHEN PRODUKTIONSGENOSSENSCHAFTEN vom 02. Juli 1982), GBL. I No. 25 at 443, in DER FASSUNG DES GESETZES vom 06. März 1990, GBL. I No. 17 at 133, as most recently amended by GESETZ vom 28. Juni 1990, GBL. I No. 38 at 483, § 19 [hereinafter LPG Law]. Buildings and structures erected by the LPG are property of the LPG and not the legal owner of the land. *Id.* § 27. The Law Concerning the Structural Adjustment of the Agriculture to the Social and Environmental Market Economy in the German Democratic Republic (GESETZ ÜBER DIE STRUKTURELLE ANPASSUNG DER LANDWIRTSCHAFT AN DIE SOZIALE UND ÖKOLOGISCHE MARKTWIRTSCHAFT IN DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK—LANDWIRTSCHAFTSANPASSUNGSGESETZ—VOM 29. JUNI 1990), GBL. I No. 42 at 642, which survived unification, Unification Treaty, *supra* note 3, annex II, ch. VI, subdiv. II, no. 1 [hereinafter Agricultural Adjustment Law] re-established private ownership of agricultural land. *Id.* § 1. It permits the partition or merger of LPGs and the conversion of LPGs into Registered Cooperatives, GmbHs or Partnerships. The Agricultural Adjustment Law also permits each LPG member to terminate his membership. In that case the member is entitled to receive the land originally contributed by him. *Id.* § 45. Government-owned agricultural land ("Volkseigentum") that is in the possession of an LPG (i.e., land that was not contributed by the farmers to the LPG) can be sold or otherwise disposed of by Treuhandanstalt. Law Concerning the Transfer of Ownership and the Leasing of State-Owned Agricultural Real Property to Cooperatives, Members of Cooperatives, and Other Persons (GESETZ ÜBER DIE ÜBERTRAGUNG DES EIGENTUMS UND DIE VERPACHTUNG VOLKSEIGENER LANDWIRTSCHAFTLICH GENUTZTER GRUNDSTÜCKE AN GENOSSENSCHAFTEN, GENOSSENSCHAFTSMITGLIEDER UND ANDERE BÜRGER vom 22. Juli 1990), GBL. I No. 49 at 899, §§ 1 & 4. These provisions refer mainly to real estate that was expropriated between 1945 and 1949. See *supra* note 63 (discussing land reform between 1945 and 1949). Property that is subject to the Property Law, *supra* note 60, is probably not intended to be covered by these provisions. Interestingly, the last-mentioned law does not deal with the sale of government-owned non-agricultural land that is in the possession of an LPG. See Trusteeship Law, *supra* note 21, § 1(6).

mer GDR.⁶⁸

The basic principle stated by the Property Law is that a former owner or his legal successor has a right to reconveyance of the property of which he was deprived by one of the above state acts. He has this right even if, after transfer of the property to state ownership, the property was conveyed to a third party.⁶⁹ A claimant always has the option to choose compensation instead of the restitution of his property.⁷⁰ The Property Law is silent on the question of how the compensation will be computed.

The Property Law also provides for the termination of public administration ("staatliche Verwaltung") over property of refugees from the Former GDR, of citizens of the Federal Republic, of companies domiciled in the Federal Republic, and of foreign owners, and governs claims against the government arising from such administration.⁷¹ This public administration must be lifted upon application by the former owner.⁷² The former owner may also relinquish his claim to reconveyance and demand compensation.⁷³

C. Exceptions from the Basic Principle

The general principle discussed above is subject to certain exceptions, whereby special exceptions apply in the case where the expropriated property consists of real estate or equity interests in companies.

1. Value Adjustment

In case of a reconveyance, the former owner must pay adjustments for an increase in value financed with public funds, and he will be compensated for decreases in value.⁷⁴

68. Property Law, *supra* note 60, § 2(2). These and other property rights are "Vermögenswerte" in the meaning of the Property Law.

69. *Id.* § 3(1).

70. *Id.* § 8.

71. *Id.* § 1(4). Public administration was a method by which the government deprived the owner of his property rights without formal expropriation.

72. *Id.* § 11(1).

73. *Id.* §§ 9 & 11(1). The rules regarding adjustment payments in case of significant worsening or improvement of an enterprise discussed below also apply in case of a reconveyance of an enterprise under public administration. *Id.* §§ 6 & 12; see *infra* note 82 and accompanying text (discussing rules of adjustment).

74. *Id.* § 7. Special rules apply to adjustments for increased or decreased value

2. Good Faith Acquisition

In certain cases, the former owner of property is limited to compensation payment or a substitute property and cannot demand the reconveyance of his property. This is principally the case where an individual third party, a church, or certain non-profit organizations have acquired the property in good faith.⁷⁵

The acquiror has not acted in good faith if:

- (i) he knew or should have known that his acquisition was not in compliance with the regulations, procedures, and orderly administrative practices of the Former GDR in effect at the time of the acquisition;
- (ii) he influenced the acquisition by corruption or a personal position of influence; or
- (iii) he took advantage of a situation of coercion or deception of the former owner.⁷⁶

Apparently, good faith is not already excluded by the fact that the acquiror knew that the property originally was owned by someone other than the government and was confiscated by the government.

in the case of companies. *Id.* §§ 6 & 12; *see infra* note 82 and accompanying text (discussing adjustment payments).

75. Property Law, *supra* note 60, §§ 4(2) & 9(1). Pursuant to § 4(2) of the Property Law, the defense of good faith does not apply to real estate and buildings that were acquired after October 18, 1989 where the acquisition should not have been approved pursuant to § 6(1) & (2) of the Regulation Concerning the Filing of Property Claims (VERORDNUNG ÜBER DIE ANMELDUNG VERMÖGENSRECHTLICHER ANSPRÜCHE vom 11. Juli 1990), GBL. I No. 44 at 718, as amended by the Second Regulation Concerning the Filing of Property Claims (2. VERORDNUNG ÜBER DIE ANMELDUNG VERMÖGENSRECHTLICHER ANSPRÜCHE vom 21. August 1990), GBL. I No. 56 at 1260, and the Third Regulation Concerning the Filing of Property Claims (3. VERORDNUNG ÜBER DIE ANMELDUNG VERMÖGENSRECHTLICHER ANSPRÜCHE vom 05. Oktober 1990), BGBl. I at 2150; in the version of BEKANNTMACHUNG DER NEUFASSUNG DER VERORDNUNG ÜBER DIE ANMELDUNG VERMÖGENSRECHTLICHER ANSPRÜCHE vom 11. Oktober 1990, BGBl. I at 2162 [hereinafter collectively ANMELDEVERORDNUNG]. Section 6 of the ANMELDEVERORDNUNG provides that governmental approval to a sale of real estate that is subject to public administration may not be granted unless the former owner has consented (§ 6(1)) and that governmental approval may not be granted as long as an ownership claim by a former owner has not been determined (§ 6(2)). The ANMELDEVERORDNUNG survived unification. Unification Treaty, *supra* note 3, annex II, ch. III, div. B, subdiv. I, nos. 2 & 3.

76. Property Law, *supra* note 60, § 4(3).

3. Reconveyance Unfeasible

The Property Law provides that reconveyance of property is excluded if a reconveyance is not feasible because of the nature of the property.⁷⁷ In this case, the former owner is limited to a compensation payment. The Property Law expressly specifies the circumstances where *real property* cannot be reconveyed because of the nature of the property. This is the case if:

- (i) the use or dedication of the premises has been changed by material alterations and this use is in the public interest;
- (ii) the premises are dedicated to common use (*e.g.*, streets);
- (iii) the premises are used for "complex housing;" or
- (iv) the premises are used commercially or as part of an enterprise, and a reconveyance would have severe adverse effects for that enterprise.⁷⁸

The scope of exclusion (iv) is unclear: it would seem that an enterprise frequently, if not always, has the option to lease the real property on which it is located and a market-related lease should not have a severe adverse effect.

4. Special Investment Purpose

The reconveyance of real estate or buildings can also be excluded and the former owner is relegated to a damage claim if the real property is sold by the present owner for purposes of a certified special investment purpose. This method of excluding a reconveyance claim will be discussed below.⁷⁹

5. Special Rules for Business Enterprises

Special rules apply to the reconveyance of expropriated enterprises and enterprises that were placed under public administration. If an enterprise as a whole has been expropriated or placed under public administration, it must be recon-

77. *Id.* § 4(1).

78. *Id.* § 5.

79. See *infra* notes 91-105 and accompanying text. The Unification Treaty, *supra* note 3, article 41(2) expresses the same concept by promising a statute which would exclude reconveyance of real property or buildings where the real property or the building is required for urgent investment projects (especially the creation of a commercial facility) which are of value to the economy (in particular creation or preserving jobs). The law will provide for compensation of the former owner.

veyed, if the enterprise in its present form is comparable to the enterprise at the time of the taking.⁸⁰ Comparability is based on products and services offered by the enterprise whereby it must be assumed that the enterprise, if it had not been expropriated, would have participated in technical progress and the general economic development.⁸¹ Significant worsening or improvement of an enterprise, measured by the balance sheet and by profitability, must be reflected in adjustment payments between the present and the former owner. Tests for determining such worsening or improvement are set forth in the Property Law.⁸²

Again, the former owner of an enterprise has the option to choose compensation instead of restitution of the enterprise.⁸³ The former owner is limited to compensation if the enterprise, in its present form, is no longer comparable to the enterprise that had originally been taken from him.⁸⁴ The amount of the monetary compensation is the value of the enterprise at the time of the taking or placement under public administration.⁸⁵

6. Additional Exceptions under the Property Law Amendments

In February 1991, the government of the Federal Republic proposed amendments to the Property Law⁸⁶ which would exclude the reconveyance of property in three additional cases.

First, pursuant to the amendments, a business enterprise need not be reconveyed if its operation has been terminated and it would not be feasible to recommence the business activities.⁸⁷ Second, real property and buildings that are subject to a

80. Property Law, *supra* note 60, §§ 6(1) & 12. The Property Law Amendments, *supra* note 60, would amend § 6 of the Property Law in various respects. In particular, the Property Law, as proposed to be amended by the Property Law Amendments, § 6(5a), (5b) & (5c), contains rules dealing with the performance of a claim for reconveyance of a business enterprise.

81. Property Law, *supra* note 60, §§ 6(1) & 12.

82. *Id.* §§ 6 & 12. Section 6(1) of the Property Law, as proposed to be amended by the Property Law Amendments, *supra* note 60, would provide that the debtor in case of a significant worsening of an enterprise, and the creditor in case of a significant improvement, is Treuhandanstalt or an intermediate parent company.

83. *Id.* §§ 6(6) & 12.

84. *Id.* §§ 6(1), 6(7) & 12.

85. *Id.* §§ 6(7) & 12.

86. Property Law Amendments, *see supra* note 60.

87. Property Law, as proposed to be amended by the Property Law Amend-

claim by a former owner need not be reconveyed if an investment project planned prior to September 29, 1990 cannot be carried out without inclusion of such real property or buildings.⁸⁸ The third proposed exclusion is probably of the greatest significance. The competent authorities may authorize the present owner of an enterprise to sell or lease out the enterprise, in spite of the fact that a former owner has filed a claim for reconveyance. Such sale or lease is permitted if it is necessary for the continuation of the business, in particular for the creation or preservation of jobs, or if it is necessary for the obtaining of investments in the framework of a rehabilitation plan.⁸⁹

D. Compensation Fund

With respect to the compensation claims, be it for real property or enterprises, it is proposed that a fund be created from which these claims can be satisfied.⁹⁰ This fund has not yet been implemented by legislation. It is unclear who will have to provide the funds for that compensation fund and how the resources will be distributed. At least it is clear that the entities holding property which does not have to be reconveyed to the former owner will not be directly liable for compensation payments. However, these entities may have to contribute to the compensation fund.

E. Acquisition of Real Property for Special Investment Purposes

A statute of the Former GDR which survived the unification, the Special Investments Law,⁹¹ provides that the present owner may validly dispose of real property and buildings, even if a claim by a former owner has been filed, if a special invest-

ments, *supra* note 60, § 4(1); see Property Law, as proposed to be amended by the Property Law Amendments, § 6(6a).

88. Property Law, as proposed to be amended by the Property Law Amendments, *supra* note 60, § 5(d).

89. *Id.* § 3(6). A final determination regarding the claims of the former owner and an application for temporary conveyance can destroy the right of the present owner to sell a business as to which claims for reconveyance have been filed. See *infra* note 114 and accompanying text (discussing temporary conveyance).

90. Joint Declaration, Unification Treaty, *supra* note 3, annex III, no. 13(c); Property Law, *supra* note 60, §§ 10 & 22(2).

91. See *supra* note 61 (citing Special Investments Law).

ment purpose is present.⁹² Thus, an investor could cut off a former owner's claim for reconveyance and relegate him to a damage claim by obtaining an official certification of a special investment purpose. This statute only applies to expropriated property,⁹³ not to property that was placed under public administration.⁹⁴ A special investment purpose exists if the real property or building is necessary for a project which is urgently needed and appropriate:

- (i) to maintain or create jobs, especially by establishing a new manufacturing or service business;
- (ii) to satisfy substantial housing needs; or
- (iii) to develop the infrastructure required for (i) or (ii).⁹⁵

The Special Investments Law requires a certification that there is such a special investment purpose. In order to obtain such certification, the investor must submit an investment plan and offer assurances that he will be able to implement the plan.⁹⁶ The certification will be issued by the local administration⁹⁷ upon an application of the present owner.⁹⁸ Applications can only be filed prior to December 31, 1992.⁹⁹ The municipality and a known former owner who has filed a claim for reconveyance must be heard prior to the issuance of a certification of a special investment purpose.¹⁰⁰ The certification may not be issued if an administrative authority or a court has rendered a decision ordering the reconveyance of the property to

92. Special Investments Law, *supra* note 61, § 1(1).

93. The real property or buildings must previously have been in Volkseigentum. *Id.*; see *supra* note 65 and accompanying text (discussing Volkseigentum).

94. See *supra* note 71 and accompanying text (explaining public administration).

95. Special Investments Law, *supra* note 61, § 1(2).

96. *Id.* § 1(3).

97. Special Investments Law as proposed to be amended by the Special Investments Law Amendments, *supra* note 61, § 2(1). The appropriate administrative officers are the County Executive (Landrat) or the Mayor (Bürgermeister).

98. *Id.*

99. *Id.* § 2(2).

100. *Id.* §§ 2(1) & 4(1). The hearing of the former owner can be dispensed with if the delay would endanger the project. *Id.* § 4(1). Notice of an application for an investment certification must be published in the Federal Gazette (Bundesanzeiger). *Id.* An excerpt from the investment certificate must also be published in the Federal Gazette and the certificate must be served on a known former owner who has filed a claim for reconveyance. *Id.* § 4(2).

a former owner.¹⁰¹ In addition, the land registry may not record a conveyance based on a certification of a special investment purpose if an administrative or judicial proceeding, which suspends the effect of that certification, has been commenced against the certification.¹⁰² Thus, an investor must take into consideration that a substantial time delay may occur in case of a proceeding initiated by a former owner.

If a certification of special investment purpose has been duly issued and is not contested, the former owner can no longer prevent the sale of the real property or building to a third party.¹⁰³ He may, however, demand from the seller a payment in the amount of the proceeds from the sale of the property or the payment of the fair market value of the property at the time of the sale, if the proceeds are significantly below this value.¹⁰⁴

The Special Investments Law provides a considerable degree of certainty for investors. Once a certification has been duly issued, an investor can acquire real property and buildings without being concerned about the possibility that they

101. *Id.* § 2(1).

102. *Id.* § 2(4).

103. *Id.* §§ 1(1) & 2(3) (second sentence). The proposed Special Investments Law Amendments, *supra* note 61, would also permit the present owner to establish a kind of long-term ground lease (Erbbaurecht, "hereditary building right"), *id.* § 1(4), or to lease out the property for a maximum term of 12 years, *id.* § 1a, to encumber the property with real servitudes (Dienstbarkeiten which are rights comparable to easements), *id.* § 1b, or to erect buildings or expand an existing plant on the property, *id.* § 1c. The approval of sale, entering into a ground lease, or construction of buildings or expansion of an existing plant must provide that such dispositions must take place within a stated period of time. *Id.* §§ 1c (2) & 1d. The creation of a long-term ground lease or of a 12-year lease or the encumbrance of the property with servitudes do not exclude a claim by the former owner for a reconveyance. He will take subject to the rights established by the present owner. In the case of a creation of a long-term ground lease, the former owner may instead of a reconveyance request payment of the market value at the time of the encumbrance with the ground lease. *Id.* § 1(4). In the case of a construction or plant expansion on the property the former owner loses his right for reconveyance. *Id.* § 1c.

104. *Id.* § 3(1). If the former owner's claim for reconveyance is cut off by an investment by the present owner, the former owner is entitled to compensation in the amount of the market value of the real property at the time of the investment by the present owner. *Id.* § 1c & 3 (1a). The present owner must give the former owner security for the compensation claim. *Id.* § 6. Increases in value financed with public funds after the expropriation and decreases in value must be adjusted. Special Investments Law, *supra* note 61, § 3(3).

might be obligated to return it to a former owner.¹⁰⁵

F. Procedure for the Assertion of Property Claims

Claims by former owners of expropriated property had to be filed by October 13, 1990.¹⁰⁶ Prior to October 13, 1990, a present owner could not dispose of the property that had illegally been taken without the purchaser becoming subject to reconveyance claims by the former owner.¹⁰⁷

At any time after October 13, 1990, the present owner or the public administrator may dispose of the property free of reconveyance claims or enter into agreements relating to the property *provided* no such claims have been filed prior to the closing of such sale or other transaction.¹⁰⁸ However, if such claim has been filed prior to the closing, the present owner or the public administrator may not dispose of the property or subject it to long-term agreements without approval of the former owner,¹⁰⁹ and any purchaser takes subject to such claim.¹¹⁰ The present owner or the public administrator has the legal obligation to investigate whether a reconveyance claim has been filed with respect to the property.¹¹¹ The important point to note is that a present owner or an investor is not entirely protected just because no filings were made prior to October 13, 1990; even a late filing is effective to prevent a disposition of the property if such filing is made prior to the conveyance of the property.¹¹²

105. See Keller & Weise, *Die Rechtlichen Gestaltungsräume lassen viele Auswege offen*, *HANDELSBLATT* (Dec. 6, 1990).

106. ANMELDEVERORDNUNG, *supra* note 75, § 3. Filings that have been made prior to July 15, 1990 must be refiled. *Id.*

The deadline for filing claims based on confiscations during the Third Reich and for takings in criminal procedures was March 31, 1991. *Id.*

107. See Property Law, *supra* note 60, § 3. However, the purchaser, especially a natural person, may have acquired good title in good faith. See *supra* notes 75-76 and accompanying text (discussing good faith acquisition).

108. Property Law, *supra* note 60, §§ 3(4), 11(2) & 15(3). The former owner has only a right to obtain the proceeds of the sale. *Id.* § 3(4) & 11(4).

109. *Id.* §§ 3(3), 11(2) & 15(2)-(3). The present owner or the public administrator may take certain actions with respect to the property which are imposed by law on the owner or which are necessary for the maintenance of the value or the management of the property. Property Law, as proposed to be amended by the Property Law Amendments, *supra* note 60, § 3(3); Property Law, *supra* note 60, § 15(2),(3).

110. Property Law, *supra* note 60, § 3(1).

111. *Id.* §§ 3(5), 11(3) & 15(4).

112. *Id.* § 3(4).

Only if an investor has acquired such property after the deadline of October 13, 1991 and no filing has been made at the time of conveyance can he no longer be subject to reconveyance claims.

If, by contrast, an investor has acquired an interest in a company that is the present owner of the property, the acquired company may still be obliged to return the property which, of course, may significantly reduce the economic value of the investor's interest in the company. Thus, the investor may opt for an acquisition of selected assets, including real property, if at the time of the transaction no reconveyance claim has been filed. Similarly, if at the time of the purchase of the company, a claim for reconveyance of real estate of the company has been filed, the investor may consider purchasing the real estate separately pursuant to the Special Investments Law.

However, the investor must understand that purchasing assets of a company under German law has in many respects the same legal consequences as purchasing the shares of the company. For example, section 613a of the German Civil Code ("Bürgerliches Gesetzbuch," commonly referred to as "BGB"), provides that if the assets acquired constitute all or a substantial part of the business or of a portion of the business of the selling company, the acquiror assumes by act of law all rights and duties arising from existing employment contracts. In addition, section 419 of the BGB exposes a purchaser to the liabilities of the selling company to its creditors if the assets acquired by the purchaser constitute all or almost all assets of the selling company.

As a practical matter, a purchaser of a property in the territory of the Former GDR either directly or as part of the purchase of a business entity, must reach an agreement or arrangement with persons who have filed claims with respect to that property. The investor cannot wait until the rights of the claimant have been determined. Even in the case where the seller is the holder of an official certification of a special investment purpose,¹¹³ it is probably in most cases advisable for the purchaser to come to an understanding with the claimant.

113. See *supra* notes 91-105 and accompanying text (discussing acquisition of real property for special investment purposes).

Again, the purchase might be otherwise considerably delayed by the commencement of administrative or court proceedings by the claimant.

In order to accelerate the privatization and the reconveyance of enterprises, the Property Law Amendments contain provisions which would simplify the reconveyance of businesses to former owners who are willing to make appropriate investments. A claimant for an enterprise is entitled to obtain possession of the enterprise on a provisional basis if his claim is beyond doubt. The claimant must enter with Treuhandanstalt into a purchase agreement or a relationship to which the rules on leases ("Pacht") apply, whereby the purchase price or rent is only payable if it is finally decided that the claimant is not entitled to reconveyance of the enterprise. Even if the claim cannot be demonstrated beyond doubt, the claimant may still obtain provisional possession if management and, where necessary, a plan for rehabilitation is provided for.¹¹⁴

The government-owned enterprises of the Former GDR frequently were conglomerates consisting of many expropriated companies. In order to implement the reconveyance of business enterprises to their former owners, it may be necessary to break up existing companies. The Property Law Amendments provide that a break up of a company may be requested by the claimant or the present owner and that such request is to be granted by the authorities when certain requirements are met.¹¹⁵

Finally, the Property Law Amendments provide that the former owner and the present owner may enter into an arbitration agreement for settling issues concerning the reconveyance of business enterprises, the provisional conveyance of possession, and the dissolution of companies. The possibility of settlement by arbitration will help to lighten the burden of the courts and to accelerate the proceedings.¹¹⁶ The Property Law Amendments also contain other provisions designed to encourage the amicable settlement of claims for reconveyance by an agreement between the former and the present owner.¹¹⁷

114. Property Law, as proposed to be amended by the Property Law Amendments, *supra* note 60, § 6a.

115. *Id.* § 6b.

116. *Id.* § 38a.

117. *Id.* §§ 30 & 31.

IV. TYPICAL PROBLEMS FACED BY AN INVESTOR

Most investors in companies located in the Former GDR are likely to be confronted with the previously discussed issues of ownership of the company and the real property on which the company is located. Of course, the investor will have to deal with all issues typically faced by an investor in or purchaser of a going concern. However, some of these issues have particular dimensions in the Former GDR.

A. *Financial Statements*

The acquired company may not have any financial statements if it has not yet prepared a DM opening balance sheet.¹¹⁸ Even if a DM opening balance sheet exists, it is not very reliable, for instance, because of uncertainties of valuation of inventory or real property. One of the questions which many investors will face is whether and to what extent Treuhandanstalt is willing to assume the liability for certain known obligations of the enterprise being purchased, to represent the correctness of the financial statements or at least of certain crucial financial data, and to indemnify the investor against unknown liabilities.

B. *Environmental Liabilities*

The environmental problems which all acquirors of businesses or real property face are vastly aggravated by the lack of environmental concern of the communist government of the Former GDR. Given the potential for substantial liability, an investor must be concerned about claims by the government or third parties based on environmental liabilities. Pursuant to the Unification Treaty, the environmental laws of the Federal Republic apply to the Former GDR with some modifications and, in addition, some of the environmental laws of the Former GDR survive.¹¹⁹ Of special importance is the continued validity of portions of the Environmental Law of June 29, 1990 of the Former GDR ("Umweltrahmengesetz," hereinafter "En-

118. See *supra* notes 28-30 (discussing obligation to prepare DM opening balance sheet and inability of many companies to do so on timely basis).

119. Unification Treaty, *supra* note 3, annex I, ch. XII; *id.* annex II, ch. XII.

vironmental Law")¹²⁰ which provides that purchasers of facilities which serve commercial purposes or are used as part of a business enterprise can be released from liability for environmental damages caused by such facility before July 1, 1990. This release may be granted by the governmental authorities upon application by a purchaser of such facility. Applications for such release must be filed prior to December 31, 1991.¹²¹ This statute gives the authorities discretion whether or not to grant a release; the decision must balance the interests of the investor and the public as well as the interest of environmental protection.¹²² It must be emphasized that a release does not cover environmental liabilities under private law to third parties.¹²³ One of the questions which most investors will face is whether and to what extent Treuhandanstalt is willing to indemnify an investor from environmental liabilities which arose prior to the acquisition.

C. Labor Law

Another major problem which almost every investor in the Former GDR will encounter is the fact that most of the enterprises are hopelessly overstaffed because of the job guarantees in the Former GDR's constitution. There are estimates to the effect that the enterprises which will survive have to reduce their staff by thirty to forty percent. Besides other significant questions of labor relations—such as working-time, vacation, illness, co-determination, etc.—one major concern is the question under which circumstances staff can be laid off in the course of rehabilitation efforts. In view of the importance of the labor costs for the overall operating result of a business, this question may well be one of the determinative issues for the decision whether or not to invest in the Former GDR.

1. Applicable Law

Pursuant to the Unification Treaty, the West German legislation regarding labor relations has taken effect in the terri-

120. GBl. I No. 42 at 649 as modified by Unification Treaty, *supra* note 3, annex II, ch. XII, subdiv. III, no. 1.

121. Environmental Law, art. 1, § 4(3), set forth in the Unification Treaty, *supra* note 3, annex II, ch. XII, subdiv. III, no. 1(b).

122. *Id.*

123. *Id.*

tory of the Former GDR with some changes.¹²⁴ Moreover, parts of the Labor Law of the Former GDR ("Arbeitsgesetzbuch") will remain in force for a transition period.¹²⁵ The basic principles of the West German labor legislation, which are now applicable in the territory of the Former GDR, include, among other things, statutory employment protection such as protection against unjustified dismissals,¹²⁶ the requirement of works councils,¹²⁷ and the election of employee representatives to the supervisory boards of large companies ("co-determination").¹²⁸ These principles and the costs they cause have to be taken into account, especially by investors from countries other than Germany who may not be used to such regulations.

Some of the more important principles and requirements that must be observed are as follows. First, a works council has to be elected by June 30, 1991 in all businesses with at least five regular employees, if demanded by the employees.¹²⁹ This works council is entitled to participate in many decisions concerning the internal relations between employer and employees. The co-determination rights of the works council relate to matters such as working hours, technical facilities to supervise the employees, social facilities, etc.¹³⁰ Moreover, the works council must be consulted with respect to imminent individual dismissals against which it may raise objections.¹³¹ If objections are raised, and if the dismissed employee brings an action against the dismissal, the employer may continue the employment pending the court proceeding.¹³²

124. Unification Treaty, *supra* note 3, annex I, ch. VIII.

125. Annex II, ch. VIII of the Unification Treaty, *supra* note 3, provides that certain sections of the Arbeitsgesetzbuch of the Former GDR, as amended by the Unification Treaty, shall survive, in most cases for a limited period of time.

126. KÜNDIGUNGSSCHUTZGESETZ [KSchG], § 1, BGBL. III 800-2, as amended.

127. BETRIEBSVERFASSUNGSGESETZ [BetrVG], § 1, BGBL. III 801-7, as amended. In companies with more than five regular employees, a works council has to be elected.

128. MITBESTIMMUNGSGESETZ [MitbestG] § 1, BGBL. III 801-8, as amended; applicable in companies employing regularly more than 2000 employees. See Gruson & Meilicke, *The New Co-determination Law in Germany*, 32 BUS. LAW. 571 (1977).

129. BetrVG, *supra* note 127, § 1; Unification Treaty, *supra* note 3, annex I, ch. VIII, div. A, subdiv. II, no. 12(b).

130. See the list in BetrVG, *supra* note 127, § 87.

131. *Id.* § 102.

132. *Id.* § 102(5).

Second, under the Co-determination Law, the supervisory boards of all German AGs and GmbHs with more than 2,000 employees must consist of an equal number of shareholder and employee representatives.¹³³ However, the representation of the employees on the board does not create a complete parity between shareholders and employees, since in case of deadlocks the chairman of the supervisory board who has been appointed by the shareholders has a double vote.¹³⁴

Finally, basic conditions of the employment contracts will, in the future, be determined by collective bargaining agreements as provided for in the West German Collective Bargaining Agreements Law.¹³⁵ Until new collective agreements have been entered into, most of the old agreements in the Former GDR dating from before the unification remain in force.¹³⁶

2. Reduction of the Workforce

The investor attempting to reduce the work force of the acquired enterprise will have to deal with the regulations intended to improve the job security for employees. There are two important legal principles that are especially relevant for enterprises in the Former GDR.

First, section 613a of the BGB provides that in case of an acquisition of a business or part of a business, but not of the entity as such, the acquiror assumes by act of law all rights and duties arising from the existing employment contracts. A termination of an employment contract based on the takeover of the business is invalid. That means that the acquiror of a business cannot initially adjust the number of employees to the actual needs of the business, but has to take over a work force that may in many cases be much larger than required as the result of the economic system in the Former GDR, in which jobs had to be preserved at any cost.

Secondly, unless there are reasons for an exceptional dismissal without notice, an investor can only reduce the work force in accordance with the provisions of the Dismissals Pro-

133. MITBESTG, *supra* note 128, § 1.

134. *Id.* §§ 27(2), 29(2).

135. TARIFVERTRAGSGESETZ [TVG], §§ 1 *et seq.*, BGBL. III 802-1, as amended.

136. Unification Treaty, *supra* note 3, annex I, ch. VIII, div. A, subdiv. II, no. 14.

tection Law ("Kündigungsschutzgesetz").¹³⁷ According to this Law, which applies to businesses with usually more than five employees other than trainees,¹³⁸ employees that have been with the business for more than six months may only be dismissed if the dismissal is, as this Law puts it, "socially justified."¹³⁹ This term means that a dismissal must be based either on reasons lying in the person or the conduct of the employee or on urgent operating requirements. In addition, the dismissal is socially unjustified if there is a possibility to assign the employee to another job within the business, possibly after a retraining period that enables the employee to carry out the new assignment.¹⁴⁰ Members of the works council mentioned above or other representative bodies may not be dismissed at all during their term, unless for exceptional reasons.¹⁴¹

Moreover, according to section 58 of the Labor Act of the Former GDR, which remains applicable in a modified form, certain categories of employees in need of special job protection may not be routinely dismissed; *e.g.*, single parents with children who are not older than ten years and have been born prior to January 1, 1992.¹⁴²

Of course, the overall economic situation in the Former GDR and the condition of many enterprises is dramatic enough to meet at least the statutory requirements for dismissals based on operational reasons which would be considered as socially justified. Nevertheless, an investor has to take into account that he bears the burden of proof and that the courts might evaluate the situation of an enterprise in a different way than he did.

In case of mass lay-offs, the Labor Office ("Arbeitsamt")

137. See *supra* note 126.

138. KSCHG, *supra* note 126, § 23.

139. *Id.* § 1.

140. It should also be stressed that even urgent operating requirements do not necessarily justify dismissal of less desirable employees, such as old employees, employees who often call in sick, disabled employees or others. The young and energetic employees, who have not been with the firm for long and who will easily find other jobs, have to be laid off first.

141. KSCHG, *supra* note 126, § 15; see BETRVG, *supra* note 127, § 78 (with respect to general protection); *id.* § 37 (with respect to continuance of payment of salary); *id.* § 38 (providing for exemption (Freistellung) of full-time members of works council); *id.* § 40 (containing provisions with respect to costs).

142. Unification Treaty, *supra* note 3, annex II, ch. VIII, div. A, subdiv. III, no. 1.

has to be notified.¹⁴³ Usually, such dismissals will not become effective until one month has elapsed since the notification of the Labor Office. A "mass lay-off" within the meaning of the Dismissals Protection Law is, *e.g.*, the dismissal of at least thirty employees within a period of thirty days in a business with at least 500 employees.¹⁴⁴ This means that necessary dismissals will be considerably delayed if a notification of the Labor Office is required due to the extent of the layoffs.

In the case of such mass dismissals an investor must consider the possibility of higher costs arising from the so-called Social Compensation Plan ("Sozialplan").¹⁴⁵ The Social Compensation Plan is, by statutory definition, an agreement between the employer and the works council on full or partial compensation for financial hardship sustained by employees as a result of proposed changes which may involve substantial disadvantages for the employees.¹⁴⁶ If the employer and the works council fail to come to an agreement on the Social Compensation Plan, either party may appeal to a so-called Conciliation Committee ("Einigungsstelle").¹⁴⁷ The Conciliation Committee will then decide with binding force on whether or not a Social Compensation Plan should be set up. The award of the Conciliation Committee replaces the agreement between the employer and the works council.¹⁴⁸

It should be pointed out that the provisions referred to do not prevent an employer from terminating an employment

143. KSCHG, *supra* note 126, § 17.

144. *Id.* § 17(1), no. 3.

145. BETRVG, *supra* note 127, §§ 111-112a.

146. Such changes within the meaning of BETRVG, *supra* note 127, § 111 are:

- (i) the reduction and closure of the business in whole or substantial parts thereof;
- (ii) the relocation of the business in whole or substantial parts thereof;
- (iii) the merging with another business,
- (iv) substantial changes in the organization of the business, the business objective or the plant; and
- (v) the introduction of completely new work methods and production processes.

147. The Conciliation Committee, which is a specific forum under the BetrVG, *supra* note 127, is regulated mainly in section 76 of the BetrVG. According to this section, the aim of the Conciliation Committee of an enterprise is to settle disagreements between the employer and the works council. The Conciliation Committee consists of an equal number of members appointed by the employer, the works council, and an independent chairman (agreed upon by both parties).

148. BETRVG, *supra* note 127, § 112(4).

contract without notice if an employee has seriously violated the provisions of his contract.

3. Short-Time Working

Short of a final termination of an employment contract, temporary short-time working may sometimes be an appropriate measure in case of overstaffing. Since overstaffing of an enterprise or insufficient demand for its products or services are frequent problems for enterprises in the Former GDR on their way to better competitiveness, the Unification Treaty makes use of this method within the Former GDR easier than it would be under West German legislation.¹⁴⁹

The West German Employment Promotion Law ("Arbeitsförderungsgesetz")¹⁵⁰ grants employees affected by short-time working the right to receive from the public a short-time working allowance ("Kurzarbeitergeld") only if it can be expected that the payment of short-time working allowance promotes job maintenance and ensures a long-term continuation of the employment. This prospect of a continued employment is not required under the law of the Former GDR, which, pursuant to the Unification Treaty, remains in force until June 30, 1991.¹⁵¹ Consequently, employers in the territory of the Former GDR can resort to short-time working and the affected employees are entitled to receive a short-time working allowance, even if it is unclear whether this measure will eventually save the jobs of the employees concerned. It must only be shown that short-time working has to be ordered in order to avoid dismissals in case of a slow-down of orders as a result of the enormous changes in the economic environment.

The applicability of this provision of the Former GDR can be extended until December 31, 1991, if this is required for the

149. Unification Treaty, *supra* note 3, annex I, ch. VIII, div. E, subdiv. II, no. 1; *id.* annex II, ch. VIII, div. E, subdiv. III, no. 1.

150. ARBEITSFÖRDERUNGSGESETZ [AFG], BGBl. III 810-1, as amended, § 63(1).

151. ARBEITSFÖRDERUNGSGESETZ vom 22. Juni 1990, GBL. I No. 36 at 403, § 63(5); Unification Treaty, *supra* note 3, annex II, ch. VIII, div. E, subdiv. III, no. 1 (b) (bb); Decree Concerning the Extension of Time For the Entitlement to Short-Time Working Payment (ANORDNUNG ÜBER DIE VERLÄNGERUNG DER FRIST FÜR DEN BEZUG DES KURZARBEITERGELDES vom 20. August, 1990) GBL. I No. 57 at 1396, surviving the unification by virtue of Unification Treaty, *supra* note 3, annex II, ch. VIII, div. E, subdiv. I, no.3.

avoidance of dismissals.¹⁵²

D. Approvals for Real Estate Transfers

Even though private ownership of land is now permitted, real estate transactions in the Former GDR still must be approved in advance by the authorities.¹⁵³ The Unification Treaty did not completely abrogate regulations requiring a prior administrative license for real estate transactions.¹⁵⁴ The reason for maintaining such a licensing procedure was that the restitution of property to rightful owners and the termination of public administration could otherwise not be ensured.¹⁵⁵ A license for a real estate transaction is not necessary where a certification of special investment purpose has been obtained.¹⁵⁶

E. Antitrust

It is worth mentioning that the West German antitrust laws and the antitrust laws of the European Economic Commu-

152. ARBEITSFÖRDERUNGSGESETZ VOM 22. JUNI 1990, *supra* note 151, § 63(5).

153. Regulation Concerning the Transfer of Real Property (VERORDNUNG ÜBER DEN VERKEHR MIT GRUNDSTÜCKEN—GRUNDSTÜCKsverkehrsordnung [GVVO] vom 15. Dezember 1977), GBL. I 1978, No. 5 at 73. This regulation was amended by the Regulation Concerning the Adjustment of Legal Remedies of Citizens and the Establishment of Jurisdiction for the Review of Administrative Decisions (VERORDNUNG VOM 14. DEZEMBER 1988 ZUR ANPASSUNG VON REGELUNGEN ÜBER RECHTSMITTEL DER BÜRGER UND ZUR FESTLEGUNG DER GERICHTLICHEN ZUSTÄNDIGKEIT FÜR DIE NACHPRÜFUNG VON VERWALTUNGSENTSCHEIDUNGEN), GBL. I No. 28 at 330, and the First Private Law Modification Law (1 ZIVILRECHTS ÄNDERUNGSGESETZ VOM 28. JUNI 1990), GBL. I No. 39 at 524.

154. Unification Treaty, *supra* note 3, annex II, ch. III, div. B, subdiv. II, no. 1. The Unification Treaty modified the GVVO, *supra* note 153. *Id.*

155. ANMELDEVERORDNUNG, *supra* note 75, § 6 which provides that governmental approval to a sale of real estate that is subject to public administration may not be granted unless the former owner has consented (§ 6(1)) and that governmental approval may not be granted as long as an ownership claim by a former owner has not been determined (§ 6(2)).

156. Section 2(1) of the Special Investments Law, *supra* note 61, provided that a license under GVVO, *supra* note 153, had to be issued where the applicant submitted a certification of special investment purpose under the Special Investments Law. The proposed Special Investments Law Amendments, *supra* note 61, would amend § 2(1) to provide that no license under GVVO is necessary if a certification of special investment purpose has been issued. Special Investments Law, as proposed to be amended by Special Investments Law Amendments, § 2(3). See *supra* note 91-105 and accompanying text (discussing Special Investments Law and Special Investments Law Amendments).

nity became fully applicable in the Former GDR and that the German Federal Cartel Office has jurisdiction for the territory of the Former GDR.¹⁵⁷ Under the West German antitrust laws, any merger must be reported to the German Federal Cartel Office if the participating companies had aggregate sales of more than DM500 million during the preceding fiscal year.¹⁵⁸ A pre-merger filing for advance clearance is necessary where one of the participating enterprises had a turnover of at least DM2 billion¹⁵⁹ or where at least two of the participating enterprises had a turnover of DM1 billion or more during the preceding fiscal year.¹⁶⁰

F. Bankruptcy

There is a high possibility that a number of companies in the Former GDR will be facing bankruptcy proceedings. The purchaser of assets of such a company will have to face the additional problems inherent in a purchase of assets from a bankrupt company. One significant factor is that the bankruptcy law of the Former GDR ("Gesamtvollstreckungsordnung") remains in force.¹⁶¹

V. THE PROTECTION OF INDUSTRIAL PROPERTY RIGHTS AFTER THE UNIFICATION

Since many investments in the Former GDR will involve an extensive transfer of technology and other intellectual property, the protection afforded by the law and the steps that may be required to obtain that protection are of importance for the planning of such investments.

157. Unification Treaty, *supra* note 3, art. 8 & annex I, ch. III, div. E, subdiv. III, no. 1.

158. Antitrust Law (GESETZ ÜBER WETTBEWERBSBESCHRÄNKUNGEN [GWB]), BGBL. III 703-1, as amended, § 23(1).

159. *Id.* § 24a(1), no. 1.

160. *Id.* § 24a(1), no. 2.

161. Unification Treaty, *supra* note 3, annex II, ch. III, div. A, subdiv. II, no. 1; see *supra* notes 14-17 and accompanying text (giving citations to Gesamtvollstreckungsordnung); see also Lübchen & Landfermann, *Das Neue Insolvenzrecht der DDR*, 11 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 829 (1990); Schmidt-Räntsch, *Die Zweite Verordnung über die Gesamtvollstreckung der DDR*, 11 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1045 (1990); *Das Insolvenzrecht nach dem Einigungsvertrag*, 1 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT (DtZ) 344 (1990); *Die neue Verordnung über die Gesamtvollstreckung der DDR*, 1 DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT (DTZ) 199 (1990).

By and large, the West German laws regarding the protection of industrial property rights have been extended to the territory of the Former GDR and are applicable to applications filed after the date of the unification, October 3, 1990. Thus, new applications after October 3, 1990 are governed by the West German Patent Law ("Patentgesetz"),¹⁶² Utility Model Law ("Gebrauchsmustergesetz"),¹⁶³ Industrial Design Model Law ("Geschmacksmustergesetz"),¹⁶⁴ and Trademark Law ("Warenzeichengesetz").¹⁶⁵ Applications for industrial property rights such as patents and trademarks, as well as the rights granted or registered upon such filings, are valid for the whole territory of the unified Germany.¹⁶⁶

One could assume that this principle of an imposition of West German laws and an extended scope of validity of industrial property rights might also apply to rights that have been granted or registered prior to the unification date, October 3, 1990, but this is not the solution chosen in the Unification Treaty.

Rather, industrial property rights granted or registered in the Former GDR or in the Federal Republic prior to unification remain valid only within the original territory of protection, and are still governed by the respective statutes that were applicable prior to the unification date.¹⁶⁷ This means that the old legislation on industrial property rights of the Former GDR is still in effect for industrial property rights that have been granted or registered under this legislation in the Former GDR.

The Unification Treaty reserves a further unification of law, particularly with respect to an extension of the validity of pre-unification industrial property rights to the whole German Territory, to the parliament of the unified Germany.¹⁶⁸

162. PATENTGESETZ (Patent Law), BGBL. III 420-1, as amended.

163. GEBRAUCHSMUSTERGESETZ (Utility Model Law), BGBL. III 421-1, as amended.

164. GESETZ BETREFFEND DAS URHEBERRECHT AN MUSTERN UND MODELLEN ("Geschmacksmustergesetz") (Industrial Design Model Law), BGBL. III 442-1, as amended.

165. WARENZEICHENGESETZ [WZG] (Trademark Law), BGBL. III 423-1, as amended.

166. Unification Treaty, *supra* note 3, annex I, ch. III, div. E, subdiv. II, § 2.

167. *Id.* § 3(1).

168. *Id.* § 13.

Although after October 3, 1991 West German industrial property right laws apply to the whole territory of Germany, there are some modifications provided for in the Unification Treaty which intend to soften the possible friction resulting from the continuing distinction between industrial property rights of the Former GDR and the Federal Republic dating from before the unification.

As a general principle, old industrial property rights granted in the Former GDR can at least be invoked as a basis for an objection against the granting or registration of new industrial property rights, even if their direct validity is limited to the Former GDR. In detail, the modifications stipulate that an invention becomes part of what is called "the state of the art" if an application for a patent has been filed in the Former GDR prior to October 3, 1990. Thus, the application in the Former GDR may preclude the granting of a new patent, for which the application has been filed after the unification, because the invention is no longer considered a novelty.¹⁶⁹ Moreover, a patent granted by the Former GDR may entitle its owner to require that a utility model registered after the unification be canceled.¹⁷⁰

Finally, the registration of a trademark in the Former GDR or an international registration for the territory of the Former GDR may entitle its owner to object against the registration of an identical new trademark for similar goods and services after October 3, 1990, or to require the cancellation of such an identical trademark that has been granted after October 3, 1990 for similar goods and services.¹⁷¹ In addition, old trademarks registered in the Former GDR may not be canceled because of the fact that they have not been used during the past five years, which would be the case under West German Trademark Law.¹⁷² However, the Former GDR trademarks are now subject to a use requirement with the relevant five-year period running from the date of the unification.¹⁷³

169. *Id.* § 6.

170. *Id.* § 7.

171. *Id.* § 9.

172. Under the WZG, *supra* note 165, a trademark may be cancelled upon application by a third party if the trademark has not been made use of by the owner within five years after its registration. WZG, § 11(1), No. 4.

173. Unification Treaty, *supra* note 3, annex I, ch. III, div. E, subdiv. II, § 10.

CONCLUSION

It becomes apparent that any form of investment in the Former GDR poses special legal problems that require early and comprehensive planning and much due diligence.

As an overall statement, one could sum up the situation by saying that investments in the Former GDR are, in many respects, similar to the investment in a bankrupt company which has to be carefully restructured and which cannot be expected to be immediately profitable. A certain amount of patience is therefore mandatory.

On the positive side, the bold action of the Federal Republic of Germany to introduce West German law in the Former GDR has created legal certainty and made it possible to accomplish acquisitions, joint ventures, and formations of new enterprises in a sound and comprehensive legal framework.

One important factor to be considered by investors in the Former GDR is the availability of governmental financial aid and subsidies which may be obtained by investors. It must be investigated at an early stage whether the planned investment meets the requirements for such financial aid.

As pointed out, there are, of course, a number of legal issues that must be addressed and considered, and there are legal complications that need not be confronted in an acquisition in West Germany. An experienced counsel will be able to handle such issues and investors should not be discouraged by them.

POST SCRIPTUM

During the printing of this Article, the Federal Republic has adopted the Property Law Amendments, *supra* note 60, and the Special Investments Law Amendments, *supra* note 61. The final Amendments differ in some respects from the proposed amendments discussed in this Article and the Authors will discuss the final Amendments in the next issue of the *Fordham International Law Journal*.